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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

JENS and SHIRRE SCHOEMER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Fifth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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43 pp

QUESTIONS PRESENTED FOR REVIEW

Supreme Court Rule 14.1(a)

I. WAS *FERES v. UNITED STATES*, 340 U.S. 135 (1950) UNCONSTITUTIONAL LEGISLATIVE ACTION BY THE SUPREME COURT WHICH SHOULD NOW BE RESCINDED, OVERRULED, OR HELD UNCONSTITUTIONAL?

II. HAS *FERES v. UNITED STATES*, 340 U.S. 135 (1950) BEEN EXTENDED TOO FAR BY THE COURTS BELOW SO THAT THE BOUNDARIES OF FEDERAL IMMUNITY UNDER *FERES* SHOULD NOW BE LIMITED?

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5th Circuit Court of Appeal decision appears at 59 F.3d 26. The decision was rendered July 25, 1995.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

Supreme Court Rule 14.1(e)

United States Constitution, Article III, Section 2.

28 U.S.C. 1254

(i) DATE OF ENTRY OF THE JUDGMENT SOUGHT TO BE REVIEWED: July 25, 1995

(ii) REHEARING OR EXTENSION OF TIME GRANTED? NOT APPLICABLE

(iii) CROSS-PETITION FOR CERTIORARI? NOT APPLICABLE

(iv) STATUTORY AUTHORITY GRANTING THE UNITED STATES SUPREME COURT JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION BY WRIT OF CERTIORARI:

Article III, Sections 1 and 2, United States Constitution and 28 U.S.C. 1254 (1): "Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods: (1) By Writ of certiorari granted upon the petition of any party to any civil or criminal case. . . . ".

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE (VERBATIM)

Supreme Court Rule 14.1(f)

The United States Constitution Art. I, Sec. 1. "All legislative powers . . . shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."

The United States Constitution Art. II, Section 1. "The executive power shall be vested in a President. . . . "

The United States Constitution Art. II, Section 2. "The President shall be commander-in-chief of the army and navy of the United States, **and of the militia of the several States, when called into the actual service of the United States** . . . " (emphasis supplied).

The United States Constitution Art. III, Section 1. "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

The United States Constitution Art. VI, Section 3. " . . . (A)ll executive and judicial officers, . . . of the United States . . . shall be bound by oath or affirmation to support this Constitution . . . "

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28 U.S.C. 2674 (first paragraph): "The United States **shall** be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, . . . " (emphasis supplied).

28 U.S.C. 2674 (third paragraph): "With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon **judicial or legislative immunity** which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled." (emphasis supplied to note no executive immunity was retained; the military is part of the executive branch of government (U.S. Constitution, Article II, sections 1 and 2)).

28 U.S.C. 2680: "The provisions of this chapter and section 1346(b) of this title shall not apply to –

* * *

(j) Any claim arising out of the combatant activities or the military or naval forces, or the Coast Guard, during time of war."

(k) Any claim arising in a foreign country.

* * *

10 U.S.C. 3495: "Members of the Army National Guard of the United States are not in active Federal Service except when ordered thereto under law."

10 U.S.C. 802(a): "The following persons are subject to this chapter (10 U.S.C. 801 et seq. [Uniform Code of Military Justice]):

* * * (3) Members of a reserve component **while they are on inactive duty training authorized by written orders which are voluntarily accepted by them and**

which specify that they are subject to this chapter . . . " (emphasis supplied).

10 U.S.C. 802(c): Notwithstanding any other provision of law, a person serving with an armed force who –

(1) submitted voluntarily to military authority;

(2) met the mental competency and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submission to military authority;

(3) received military pay or allowances; and

(4) performed military duties; is subject to this chapter **until such person's active service has been terminated** in accordance with the law or regulations promulgated by the Secretary concerned." (emphasis supplied).

STATEMENT OF THE CASE

Supreme Court Rule 14.1(g)

PRELUDE:

Houston, Texas is physically located within the geographic boundaries of the United States.

On December 19, 1991, the United States was NOT at war anywhere in the world and no Congressional declaration of war was in effect.

The Federal Tort Claims Act (28 U.S.C. 2671, et seq.) waives federal immunity from suit EXCEPT (inter alia) where the injury is one "Arising out of the combatant

activities of the military or naval forces, or the Coast Guard, during time of war." (28 U.S.C. 2680(j)).

HISTORY:

Jens Schoemer joined the U.S. Army at the age of 17 on August 18, 1987. He contracted an eight year obligation, only 4 years of which were to be served in ACTIVE DUTY. The remaining four years could be served as a member of the INACTIVE RESERVE (subject to recall to active duty at any time). Jens served four years active duty, then was RELEASED from ACTIVE DUTY on August 16, 1991. His status was that of "CIVILIAN". Having been discharged from ACTIVE DUTY, Jens was not subject to the Uniform Military Code of Justice unless ordered to return to ACTIVE DUTY. (10 U.S.C. 802(a)(3) and (c)). No such order occurred. Jens later considered joining the Louisiana National Guard. Prior to making his final decision to do so, and prior to being sworn in as a National Guardsman, Jens was required to take a physical examination.

At the Military Entrance Processing Station in Houston, Texas, as the civilian Jens Schoemer underwent his PRE-ENLISTMENT physical (BEFORE SIGNING UP AND SWEARING THE OATH TO JOIN THE NATIONAL GUARD), a physician, Dr. Schnur, recognized and wrote in Jens' chart about acromegaly.[1] However, another physician, Dr. Magliolo, the Chief Medical Officer of the

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[1] Acromegaly is a tumor of the pituitary gland which is NON-Malignant 95 out of 100 cases; it causes an excessive secretion of human growth hormone, resulting in thick growth of soft tissue and other hormonal changes. Left unattended, it can

M.E.P.S., scratched through the entry. Jens was never told of the condition, despite specific regulations which the M.E.P.S. were supposed to follow.[2] More than ten months delay in diagnosis occurred, during which time significant damage occurred. Two brain surgeries were unsuccessful, leaving Jens with permanent disabilities.

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cause death. Treated, likelihood of complete success is about 78-85%. The disease was identified in 1887; surgical treatment was developed in 1909. By 1932 the death rate had fallen to below 3%. By 1957 the death rate was considered "negligible". If diagnosed timely, it can be controlled by medication and a person can lead a completely normal life.

[2] Regulation 601-270 commands the M.E.P.S. to follow certain procedures. Army Regulation 601-270 figure 9-7 "Obvious Physical Disqualifying Conditions for Military Service:

(1) Acromegaly"

* * *

Army Regulation 601-270 appendix H-10 in part says:

"When an applicant is found to be medically unfit for specific enlistment programs, he or she will be thoroughly counseled by the examining physician concerning the disqualifying condition. If the condition is such that remedial medical care will qualify the individual for military service, or *if such is not the case* **but the individual's personal health and well-being can be improved,** ***he or she will be advised to seek the services of a family physician or local health agency.*** An entry will be made in item 75 reflecting the fact that the applicant has been informed of the condition requiring medical treatment." (emphasis supplied).

COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW:

1. The Original Complaint seeking damages for medical malpractice was filed on December 20, 1993. **[Tr. pp. 9-1]**

2. The Government filed a Motion to Dismiss on 02-08-94. **[Tr. p. 20]**. The Motion was denied on March 18, 1994. **[Tr. pp. 185-188]**.

3. The United States was substituted as the sole remaining party defendant by Motion filed April 5, 1994 (Order signed April 14, 1994). **[Tr. pp. 201-205]**.

4. The Plaintiffs filed a Motion for Summary Judgment on August 8, 1994 **[Tr. pp. 210-371]**, and the Government filed a Motion for Summary Judgment on August 15, 1994 **[Tr. pp. 372-507]**. These motions were deferred by the Court on 09/30/94. **[Tr. pp. 675-679]**.

5. The Government's previously denied Motion to Dismiss was set aside and the case dismissed "for lack of subject matter jurisdiction" with prejudice on 09-30-94. **[Tr. pp. 675-679]**.

6. Plaintiff mailed the Notice of Appeal on October 13, 1994 and the Notice was filed in the District Court on October 17, 1994. **[Tr. p. 681]**

7. The Fifth Circuit Court of Appeal affirmed the lower court ruling by decision dated July 25, 1995, [appendix 1 and 59 F.3d 26 (5th Cir., 1995)]

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

Supreme Court Rule 14.1(i)

Original Jurisdiction of the United States District Court for the Southern District of Texas (Houston) arises under the Federal Tort Claims Act (F.T.C.A.), 28 U.S.C. 2671, et seq.

ARGUMENT

Supreme Court Rule 14.1(j)

I. *FERES* WAS UNCONSTITUTIONAL LEGISLATIVE ACTION BY THE COURT; IT SHOULD BE RESCINDED OR OVERRULED.

It is a shame of modern America that on December 19, 1991, when Jens Schoemer contemplated joining the Louisiana National Guard, he would have been better off robbing a Federal bank. At least as a prisoner in a federal prison he would be granted the protection of the courts from the harm of medical malpractice that he experienced.[3] Or maybe he should have joined the post office or the Fire Service.[4] That way, he could have the rights that

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[3] Federal prisoners have a cause of action against federal prison officials under the Federal Tort Claims Act (F.T.C.A.). See *United States v. Muniz*, 374 U.S. 150, 83 S. Ct. 1850 (1963).

[4] Government firefighters are entitled to have the courts hear their damage claims against the government under the F.T.C.A. Since the service being performed by the firefighters benefits the entire nation, it would be inequitable to visit the cost of injuries or death on the victims. Allowing claims to

Congress wrote: i.e., that peacetime military personnel have their day in Court just like the prisoners and the postal workers and even aliens.[5] But alas, Jens chose to swear an oath to support the Constitution and laws of the United States[6] and to serve his State (and if so ordered,

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proceed spreads the cost out over the entire nation. See *Rayonier, Inc. v. United States*, 352 U.S. 315, 77 S. Ct. 374 (1957).

[5] Yes, even aliens are authorized to sue the United States for damages. See 28 U.S.C. 2502. But soldiers and sailors in **combatant activities during time of war** have been excluded from this privilege (28 U.S.C. 2680 j); Nevertheless, the Courts, re-writing the law, have also prohibited soldiers and sailors in NON-COMBATANT activities during PEACETIME from recovering the same kinds of damages available to tort victims " . . . in the same manner and to the same extent as a private individual under like circumstances . . . " (28 U.S.C.2674).

[6] Supreme Court justices also swear an oath to the Constitution (See Article VI, U.S. Constitution). Certain verses from the Reply Brief of Plaintiffs in the Fifth Circuit are apropos:

"The coup occurred without a fight,
Not a single Judge was killed.
The military is in control;
All must now bow to its will.
* * *

The nations and the powers who
Raise armies with such force;
Do not need a judge to watch them
Or to protect them on their course.

But what about the Minuteman,
The soldier-citizen?
While he guards his home,
Who watches out for him?

Were all the tanks and ships at sea
Pointed at the Supreme Court's door,
And all the guns and rockets
And all the planes that soar . . .

also to serve his nation).[7] Until now, only the peacetime military has been excluded from the protection of the F.T.C.A. because of the infamous and highly criticized *Feres* decision. Congress had not done so, but the Supreme Court legislated such in its *Feres* decision. *Feres v. United States*, 340 U.S. 135 (1950):

(1) At page 158:

> "The Military Personnel Claims Act . . . **now superseded by 28 U.S.C. 2672** . . . permitted recovery in some circumstances, but it specifically excluded claims of military personnel '**incident to their service**'." (emphasis supplied).

It would still be the judges's duty,
According to the oath he swore . . .
To obey the Constitution.
Let the guns and rockets roar."

[7] Prior to the 1981 amendments to the Federal Tort Claims Act, National Guardsmen were considered employees of the State or Territory, RATHER THAN federal employees (unless they were employed in the federal service, i.e., "nationalized"). *Storer Broadcasting Company v. United States*, 251 F.2d 268 (5th Cir. 1958), *cert. denied*, 356 U.S. 951, 2 L.Ed.2d 844, 78 S. Ct. 916 (1958); *Ursilich v. Puerto Rico National Guard*, 384 F. Supp. 736 (U.S.D.C. D. PR 1974). The 1981 amendments to the Federal Tort Claims Act INCLUDED members of the National Guard as Federal employees but ONLY while the National Guardsmen were engaged in training or duty specifically itemized under Title 32, Sections 316, 502, 503, 504, or 505. A perusal of these sections will show that pre-induction physicals are NOT itemized in these sections. National Guardsmen, in order to be considered as federal employees, must be engaged in training or duty specifically itemized under Title 32, Sections 316, 502, 503, 504, or 505, 10 U.S.C. 3495 (from p. 4 supra).

[Thus the 1950 Supreme Court recognized that the "incident to service test" of the old law had been superseded by the F.T.C.A.; yet the old test was retained by the *Feres* Court, and the language of the F.T.C.A. was ignored. Even if the Congress made an error, the Supreme Court did not have Constitutional authority to adopt the "incident to service" test rejected by Congress in the F.T.C.A.]

(2) Active duty test. The Supreme Court has thus far only extended government immunity to situations involving active duty service people. No Supreme Court case has yet extended immunity as far as the Fifth Circuit has in this case, to a National Guard applicant, who has served his active duty and been released from active duty and is not subject to the Uniform Code of Military Justice at the time of the injury.

In *Brooks v. United States*, 69 S. Ct. 918 (1949), [the Supreme Court held that injury claims of soldiers [these soldiers happened to have been on furlough at the time of injury] were cognizable under the F.T.C.A.] The Court held at p. 919:

> "The statute's terms are clear. They provide for District Court **jurisdiction over any claim founded on negligence** brought against the United States. We are not persuaded that 'any claim' means 'any claim but that of servicemen.' The statute does contain **twelve exceptions**. . . . [now 28 U.S.C. 2680]. **None exclude petitioner's claims**. One is for claims arising in a foreign country. A second excludes claims arising out of combatant activities of the military or naval forces, or the Coast Guard, during time of war. **These . . . exceptions . . . are too**

> **specific . . . to take away petitioners' judgments. . . . It would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed. The overseas and combatant activities exceptions make this plain." (emphasis supplied).**

The *Brooks* Court also said, at page 920:

> "Provisions in other statutes for disability payments to servicemen, and gratuity payments to their survivors . . . indicate no purpose to forbid tort actions under the Tort Claims Acts. Unlike the usual Workman's Compensation statute, . . . there is nothing in the Tort Claims Act or veterans' laws which provide for exclusiveness of remedy."

[The *Brooks* decision has NEVER been overruled.]

The *Feres* doctrine has been criticized unremittingly by legal scholars throughout the nation.[8] Conspicuously,

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[8] See *Monaco v. United States*, 661 F.2d 129, 131 (9th Cir., 1981), *cert. denied*, 102 S. Ct. 2269, 73 L.Ed.2d 1284 (1982); see also "Time to Repeal Feres Doctrine", Lipsig, Harry H., *New York Law Journal* v 197 p.1 April 24, 1987; "Making Intramilitary Tort Law More Civil: a Proposed Reform of the Feres Doctrine", Schwartz, David Saul, *Yale Law Journal* 95 n5 992-1016, April, 1986; "Feres Doctrine at the Cliff's Edge?", Reed, Michael, *University of Pittsburgh Law Review*, 42 n1 115-130, Fall, 1980; "The Feres Doctrine: here today – gone tomorrow?" Hornbrook & Kirschbaum, *Air Force Law Review* 33 1-18, Spring, 1990; "Protecting the Power of Brokers: of Feres, immunity and privilege", Richmond, Michael L., *Suffolk University Law Review*, 22 n3 623-648, Fall, 1988; "Unraveling Misapplications of Feres", Middleton, Martha, *National Law Journal*, v10 p.7 October 12, 1987; and "The 'Feres' doctrine: military injustice.", Lipsig, Harry H. *New York Law Journal*, v202 n123 p.3, December 28, 1989.

the F.T.C.A. contains no specific peacetime exclusion for military personnel. See "The Feres Doctrine: Here today – Gone Tomorrow?" Hornbrook and Kirschbaum, The Air Force Law Review, 1990, pp. 1-18, in which footnote 12 is especially interesting:

> " . . . (C)ongress considered a military exclusion but decided against it. For example, all but two of the eighteen tort claims bills introduced in Congress between 1925 and 1935 contained clauses that retained governmental immunity from military torts. See *Brooks v. United States*, 337 U.S. 49, 51-52 (1949). The forerunner of the FTCA was H.R. 7236, introduced in the 76th Congress. This bill would have excluded recovery for "Any claim for which compensation is provided for by . . . World War Veterans Act of 1924." The same bill, retitled H.R. 181, was introduced in the 79th Congress. Congress reconsidered the bill, struck out the Veterans exception, and enacted the remainder as the FTCA. It is also conspicuous because claims arising from combatant activities in wartime were specifically addressed and denied a cause of action, but military peacetime activities were not addressed. See Hitch, "The Federal Tort Claims Act and Military Personnel", 8 Rutgers Law Review 316 (1954) for a complete summary of the FTCA legislative history."

As a student of the Constitution, it is impossible to explain how the Supreme Court is enabled to alter legislation by Congress. But it is possible to explain how the Supreme Court in 1950 chose to reach a decision favorable to the U.S. Army and ignoring both individual rights

and the procedures of the U.S. Constitution.[9] It is another shame that the effect of McCarthy's unsupported smear campaign has been allowed to ripple for 45 years to the detriment of U.S. Servicemen and now (if the Fifth Circuit's decision is to stand) of state militia even when not in federal service. It is time to put to rest the *Feres*

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[9] The year before *Feres*, the Supreme Court interpreted the Federal Tort Claims Act in *Brooks v. United States*, 69 S. Ct. 918 (1949). The Supreme Court reached an entirely different conclusion in *Brooks* than it did a year later in *Feres*.

Senator Joseph McCarthy was not nationally known until his speech February 9, 1950 in which he claimed there were 57 card carrying Communists in the State Department. More speeches ensued, the numbers changed and grew. Evidence was scarce, but allegations were rampant. Senate Resolution 231 created the Tydings committee to investigate communist infiltration into the federal government. Hearings began March 8, 1950. The U.S. Supreme Court refused to grant a rehearing to 2 of the "Hollywood Ten" convicted of refusing to answer questions regarding communism before the House Un-American Activities Committee. Peoples' livelihoods and lives were being wrecked by the mere allegations which were being flung about. In June, 1950, McCarthy read an indictment of General Marshall, then Secretary of State. In November, 1950 there was an assassination attempt on President Truman; Chinese Communist hordes were overrunning General McArthur's positions in Korea; and the Soviet Press boasted that in the second half of the twentieth century, "all roads will lead to communism." *When Angels Wept – the Senator Joseph McCarthy Affair – a Story Without a Hero"* by Lately Thomas, William Morrow and Co., Inc., New York, 1973.

Feres was argued in the midst of McCarthy's reign of terror in Washington, D.C., on October 12-13, 1950. *Feres* was decided on December 4, 1950.

Senator Joseph McCarthy was reined in on December 2, 1954 when he was censured by the United States Senate. *id.*

Sometimes time for reflection yields more rational results.

decision, in its proper place in history, along with *Plessy v. Ferguson*, 163 U.S. 537 (1896) and similar historical anomalies.

II. *FERES* HAS BEEN EXTENDED TOO FAR BY THE COURTS BELOW AND THE BOUNDARIES OF FEDERAL IMMUNITY UNDER *FERES* SHOULD BE LIMITED.

Even if the Supreme Court chooses to allow a future Court to correct the clear error of *Feres*, something needs to be done NOW to draw a line or set a boundary for lower courts to follow. Considering the legislative action by the 1950 Supreme Court in reading language into the statute which is not there, and ignoring other language which is present in the F.T.C.A., the lower courts have entered their own "feeding frenzy" like sharks trying to show their own ability to legislate. Despite the fact that no Supreme Court decision has ever extended the immunity of *Feres* to victims other than active duty service people, the Fifth Circuit below now wants to extend the horror and unfairness of *Feres* to state militia and to NON-active duty military. This is the problem with allowing men to change written law at will. That is why our legal system suffers when written law is not applied as written. As President Grant is attributed to have said: "The surest way to insure the repeal of bad laws is to enforce them." If the F.T.C.A. was a Congressional error (which is fully denied), then it should be enforced AS WRITTEN until Congress changes it.[10]

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[10] The Supreme Court has also ruled that the construction given an Act of the Seventy-ninth Congress by the Eighty-fourth

Another factor which should commend this solution is a reading of other statutes which have been adopted by Congress in this specific area (medical malpractice). For instance 10 U.S.C. 1089 (Public Law 94-464) was adopted at the height of the non-existent but well publicized "medical malpractice crisis".[11] Congress' express purpose was to relieve physicians of the burden of malpractice by assuming the liability on the part of the United States. (Does this sound like Congress thought it had extended immunity to such cases as Jens Schoemer's ?)

Besides, in the overall scheme of things, isn't it the choice of Congress that the burden of malpractice or negligence shall not be visited only on the few victims, but should be spread out among the nation?

> " . . . (A)fter long consideration, Congress, believing it to be in the best interest of the

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Congress is not determinative (*Rainwater v. United States*, 356 U.S. 590, 593; 78 S. Ct. 946, 949; 2 L.Ed.2d 996), and the acquiescence of subsequent Congresses does not of necessity constitute approval. *United States v. Muniz*, 83 S. Ct. 1850, 374 U.S. 150 (1963) at footnote 14.

"Members of the Army National Guard of the United States are not in active Federal service except when ordered thereto under law." (10 U.S.C. 3495).

However, " . . . even soldiers on furlough can be recalled to active duty; yet soldiers on furlough have an F.T.C.A. claim if injured". *Adams v. United States*, 728 F.2d 736, 739 (1984) [footnote 10]; citing *Hand v. United States*, 260 F. Supp. 38, 41 (M.D. Ga. 1966).

[11] The "medical malpractice crisis" was an insurance company ploy to increase profits, documented in "The Manufactured Crisis" *Consumer Reports* (August, 1986) and in 60-minutes January 1, 1988: "Insurance Crisis? An Expose of the Insurance Industry's Deceptive Media Campaign".

> nation, saw fit to impose such liability on the United States in the Tort Claims Act. Congress was aware that when losses caused by such negligence are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the Government and the resulting burden on each taxpayer is relatively slight. But when the entire burden falls on the injured party, it may leave him destitute or grievously harmed. Congress could, and apparently did, decide that this would be unfair when the public as a whole benefits from the services performed by Government employees." *Rayonier, Inc. v. United States*, 77 S. Ct. 374, at 377; 352 U.S. 315 (1957).

Formerly, the immunity of *Feres* was only extended to injuries suffered by service people while they were on *active duty* and thus *subject to military discipline.*

> "The present case is, in our view, governed by *Brooks* [*Brooks v. United States*, 69 S. Ct. 918, 337 U.S. 49 (1949)], not by *Feres*. The injury for which suit was brought was **not incurred while respondent was on active duty or subject to military discipline**. The injury occurred after his discharge, **while he enjoyed a civilian status**. The damages resulted from a defective tourniquet applied in a veterans' hospital. Respondent was there- . . . because he had been in the service and because he had received an injury in the service. And the causal relation of the injury to the service was sufficient to bring the claim under the Veterans Act. But, unlike the claims in the *Feres* case, **this one is not foreign to the broad pattern of liability which the United States undertook by the Tort Claims Act**. . . . *United States v. Brown*, 348 U.S.

> 110, at 112; 75 S. Ct. 141, at 143." (emphasis supplied). [Cited in *Bankston v. United States*, 480 F.2d 495 (5th Cir., 1973).]
>
> "We noted in the *Brooks* case . . . that the usual workmen's compensation statute was in this respect different from those governing veterans, that Congress had given no indication that it made the right to compensation the veteran's exclusive remedy, that the receipt of disability payments under the Veterans Act was not an election of remedies and did not preclude recovery under the Tort Claims Act but only reduced the amount of any judgment under the latter act. We adhere to that result. *United States v. Brown*, 348 U.S. 110, at 112; 75 S. Ct. 141, at 144."

The new boundary should be stated something like this: 28 U.S.C. 2680(j) shall be interpreted to mean that U.S. Military personnel SHALL have a right of action against the United States, in the same circumstances as they would have if they were not military, "**EXCEPT where the cause of action arises from combatant activities during time of war.**" I apologize if this seems like an exact quote from the tort claims act, but, having studied it quite a bit, I don't know how Congress could have made it any clearer. In such a case, the 1950 Supreme Court was in error to adopt the "incident to service test" which the Congress had rejected in the 1946 F.T.C.A. Accordingly, a private in the army, subjected to medical malpractice in Houston, Texas on December 19, 1991 (not during a time of war) would be entitled to pursue his claim in Court.

If this is not sufficient, and the Court believes that the "incident to service test" (which was the law before the F.T.C.A. was enacted in 1946 [as discussed in *Feres*] should still be in effect, then the Court should adopt a

bright line test of "active duty". A service person on active duty might arguably be "in combatant activities" and the Supreme Court can just assume that the United States is ALWAYS "at war". [Or we could return to the Constitution and do it the way the Constitution requires until it is amended.] The latter course would probably instill respect in the law and the Court. That would be a lofty goal and fitting for a nation of laws, not men.

The loose extension of *Feres* immunity to more and more situations,[12] extending further and further from the written law, is a throwback to times of monarchy; where "king's law" was summoned to benefit the government, but the people were left without recourse. It should be remembered that such a course of action led to revolution. The Court of Appeal in this instance has extended immunity to a non-active duty applicant for the Louisiana National Guard, who was injured due to medical negligence in Houston, Texas, (not a foreign country), while our nation was not at war. 28 U.S.C. 2680(j) is the law. But if the Courts can extend immunity to the government to isolate negligent physicians from liability (when the negligent physicians will not pay anyway because of 10 U.S.C. 1089), then someone needs to re-write the civics

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[12] A sampling of cases extending immunity include: Intentional Acts: *Citizens National Bank of Waukegan v. United States*, 594 F.2d 1154 (7th Cir., 1979)

Product liability:	*Stencil Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977)
Uninformed LSD Testing:	*United States v. Stanley*, 107 S. Ct. 3054 (1987)
Atomic Radiation: Experiments	*Jaffee v. United States*, 663 F.2d 1226 (3rd Cir. 1980), *cert. denied*, 457 U.S. 1133 (1982)

books because this is not the nation students learn about in school.

It is the sworn duty of the Supreme Court justices to uphold the Constitution of this nation. Congress wrote the Federal Tort Claims Act which overruled the "incident to service" exception to the government's waiver of immunity. [See *Feres*, 340 U.S. 135 (1950), at page 158: "The Military Personnel Claims Act . . . **now superseded by 28 U.S.C. 2672** . . . permitted recovery in some circumstances, but it specifically excluded claims of military personnel '**incident to their service**'." (emphasis supplied)].

However, Courts of Appeal have been using the "incident to service test" (which even the *Feres* court recognized as being overruled by the F.T.C.A.) to extend immunity to the government in ever widening circles. This procedure must be stopped. Congress could not write the law any clearer.

Persistent voices have called for Congress to pass legislation modifying *Feres*. In the 98th Congress, H.R. 1942 was brought before the Subcommittee on Administrative Law and Governmental Relations; H.R. 3174 passed the House during the 99th Congress; H.R. 1054 passed the House during the 100th Congress; and in 1989, H.R. 536 passed the 101st Congress. None of these bills were considered by the Senate prior to adjournment. The latter bill provided for almost identical language to that in the present F.T.C.A. (i.e., subject to foreign country and combatant activities exceptions). The bill also allowed for

reducing any judgment or settlement for a credit for compensation benefits paid by the government.[13]

We live in a time when much public disrespect exists for laws and lawyers. Letting words have the meaning that is ordinarily attributed to them would go a long way to promote law rather than revolution.

REASONS FOR GRANTING THE WRIT

1. The decision of the Fifth Circuit in this case is contrary to all prior U.S. Supreme Court decisions because it extends federal immunity to bar the claim of a serviceman who was NOT on active duty at the time of his injury.

2. The *Feres v. United States* decision is contrary to the United States Constitution because it violates the separation of powers of the legislative and judicial branches of government, constituting legislative action by the judiciary.

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[13] Hornbrook and Kirschbaum, *Air Force Law Review*, 1990, p. 16.

CONCLUSION

The lower courts have misapplied the "incident to service test" (which was rejected by the Federal Tort Claims Act of 1946 but re-instituted by the Supreme Court in *Feres v. United States*), and the lower courts need a bright line test to differentiate the circumstances under which federal immunity will apply in injuries to military personnel. It is suggested that no clearer line could be stated than that in the Tort Claims Act itself, to-wit: 28 U.S.C. 2680(j) "combatant activities . . . during time of war"; however, if the Supreme Court desires to delay justice to servicemen and servicewomen, at the very least, an "active duty" test should be used.

Alternatively, the Supreme Court should re-examine *Feres v. United States* under the Constitutional separation of powers, and reinstitute the written law of Congress, waiving immunity except under the circumstances set forth in 28 U.S.C. 2680(j) and (k). *Feres* should be overruled.

WHEREFORE, petitioner prays that this Court grant a writ of certiorari to the Court of Appeal for the Fifth Circuit to correct the error below.

Respectfully submitted by:

OLIVER "JACKSON" SCHRUMPF
Attorney for petitioners,

APPENDIX

Decision of the U.S. Circuit Court of Appeal for the Fifth Circuit, July 25, 1995 (59 F.3d 26) ...App. 1

Order of the U.S. District Court Southern District of Texas, Norman W. Black, Chief Judge, September 29, 1994 .....App. 9

Jens SCHOEMER and Shirre Schoemer, Plaintiffs-Appellants,

v.

UNITED STATES of America, et al., Defendants-Appellees.

No. 94-20793
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

July 25, 1995.

Serviceman sued United States under Federal Tort Claims Act (FTCA), alleging medical malpractice in connection with medical examination that was prerequisite to his enlistment in Louisiana National Guard after he was assigned to inactive reserves following active duty. The United States District Court for the Southern District of Texas, Norman W. Black, J., dismissed action. Plaintiff appealed. The Court of Appeals, Duhé, Circuit Judge, held that *Feres* doctrine barred action.

Affirmed.

Appeal from the United States District Court for the Southern District of Texas.

Before DUHÉ, WIENER and STEWART, Circuit Judges.

DUHÉ, Circuit Judge:

Jens and Shirre Schoemer appeal the district court's dismissal of their suit against the United States. Jens Schoemer sought recovery for alleged medical malpractice under the Federal Tort Claims Act (FTCA), 28 U.S.C.

§§ 1346(b), 2671-2680 (1988), and his wife Shirre Schoemer sought damages for loss of her husband's income, support, and consortium. The court dismissed the case for lack of subject matter jurisdiction based on *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950). We affirm.

BACKGROUND

Jens Schoemer enlisted in the United States Army in 1987 for an eight year term. After serving four years on active duty, Schoemer was assigned to the inactive reserves in August 1991. He decided to serve out his term in the Louisiana National Guard, which required him to undergo a preenlistment medical examination.

In December 1991, Schoemer reported to the U.S. Military Entrance Processing Station in Houston for the examination. He alleges that Dr. Schnur diagnosed him as having acromegaly, an abnormality of the pituitary gland, and recommended that Schoemer be referred to an internal medicine clinic. Instead, Dr. Magliolo, the Chief Medical Officer, pronounced Schoemer eligible for duty and did not recommend any treatment. Schoemer was diagnosed as having acromegaly eleven months later. He alleges that the delay in treatment has caused him significant injury.[1]

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[1] Schoemer underwent two operations, one of which was intercranial. He has significant hormonal problems, loss of function in one eye, and a permanent scar.

The Schoemers brought an FTCA suit against the United States which moved to dismiss citing Feres. Initially, the court denied the motion citing our decisions in *Jones v. United States*, 729 F.2d 326 (5th Cir.1984), and *Adams v. United States*, 728 F.2d 736 (5th Cir.1984). On cross motions for summary judgment, however, the court changed its mind and applied *Feres*. Consequently, the court did not consider the summary judgment motions because it dismissed the case for lack of subject matter jurisdiction.

DISCUSSION

The Supreme Court created a judicial exception to the FTCA for injuries to servicemen that arise from the course of activity incident to service. *Feres*, 340 U.S. at 146, 71 S.Ct. at 159. Three rationales support the exception: (1) the "distinctively federal" relationship between a serviceman and his superiors; (2) the ability of servicemen to receive no-fault statutory disability and death benefits; and (3) the need to preserve military discipline and prevent judicial second guessing of military decisions. *United States v. Johnson*, 481 U.S. 681, 688-91, 107 S.Ct. 2063, 2067-69, 95 L.Ed.2d 648 (1987). Whether Feres applies to deprive a court of subject matter jurisdiction is a question of law, which we review de novo. *Miller v. United States*, 42 F.3d 297, 300 (5th Cir.1995).

Feres applies if the serviceman's injury was incident to military service. *Johnson*, 481 U.S. at 691, 107 S.Ct. at 2069. We examine the totality of the circumstances to determine whether a serviceman's injury was incident to military service. *Parker v. United States*, 611 F.2d 1007,

1013 (5th Cir.1980). In particular, we consider: (1) the serviceman's duty status; (2) the site of his injury; and (3) the activity he was performing. *Id.* at 1013-15.

We often treat the serviceman's duty status as the most important factor because it indicates the nature of the nexus between the serviceman and the Government at the time of injury. *Adams*, 728 F.2d at 739. We view duty status as a continuum ranging from active duty to discharge. *Cortez v. United States*, 854 F.2d 723, 725 (5th Cir.1988). Duty status may be dispositive; *Feres* applies to a serviceman who is on active duty and has active status but not to one who has been discharged. *Jones*, 729 F.2d at 328; *Adams*, 728 F.2d at 739; *see also United States v. Brown*, 348 U.S. 110, 112, 75 S.Ct. 141, 143, 99 L.Ed. 139 (1954) (distinguishing servicemen who are on active duty and subject to military discipline from discharged servicemen who have civilian status). Nevertheless, if the serviceman's duty status falls somewhere in the middle of the continuum, then duty status is less important and we look to the other factors. *Kelly v. Panama Canal Comm'n*, 26 F.3d 597, 600 (5th Cir.1994).[2]

At the time of Schoemer's examination, he had inactive status in the Army and was preparing to enter the Louisiana National Guard. *Feres* applies both to reservists

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[2] *Feres* can apply to a serviceman who is not on active duty at the time of injury. *Miller*, 42 F.3d at 303. *Jones* and *Adams* do not counsel otherwise. Rather, we *require* application of *Feres* to medical malpractice cases when the serviceman is on active duty at the time of the alleged malpractice. *Scales v. United States*, 685 F.2d 970, 973 (5th Cir.1982), *cert. denied*, 460 U.S. 1082, 103 S.Ct. 1772, 76 L.Ed.2d 344 (1983).

and National Guardsmen. *Stauber v. Cline*, 837 F.2d 395, 399 (9th Cir.) *cert. denied*, 488 U.S. 817, 109 S.Ct. 55, 102 L.Ed.2d 33 (1988); *Estate of Martinelli v. United States Dep't of the Army*, 812 F.2d 872, 873 (3d Cir.), *cert. denied*, 484 U.S. 822, 108 S.Ct. 82, 98 L.Ed.2d 44 (1987); *Anderson v. United States*, 724 F.2d 608, 610 (8th Cir.1983); *Mattos v. United States*, 412 F.2d 793, 794 (9th Cir.1969). Although Schoemer was no longer on active duty, he was still in the Army. Because Schoemer's duty status does not answer the *Feres* question dispositively, we consider the other *Parker* factors.

In medical malpractice cases, however, the duty status inquiry subsumes the inquiry concerning the serviceman's activity at the time of injury. *Adams*, 728 F.2d at 741. In place of *Parker's* third factor we inquire whether the serviceman's treatment was intended to return him to military service. *Id.* Because the purpose of Schoemer's medical examination was to allow him to enlist in the Louisiana National Guard, the examination was a prerequisite to his return to military service.[3]

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[3] Because *Parker's* third factor supports the application of *Feres* to this case, we distinguish two separate lines of cases that have allowed FTCA claims to proceed. First, when an active duty serviceman sustains an injury on leave or furlough, we focus on the serviceman's activity to show that he was not acting incident to military service. *See, e.g., Parker*, 611 F.2d at 1015. Second, when a serviceman alleges medical malpractice at a time when he has not yet been discharged, we focus on the purpose of his treatment to show that his injury was not incident to military service. *See, e.g., Cortez*, 854 F.2d at 725; *Adams*, 728 F.2d at 741.

One court has applied Feres to bar an FTCA claim arising from a National Guard preenlistment medical examination. *Hall v. United States*, 528 F.Supp. 963, 967-68 (D.N.J.1981), *aff'd*, 688 F.2d 821 (3d Cir.1982). Other courts have reached the same result for medical examinations that are a prerequisite to active duty. *See Bowers v. United States*, 904 F.2d 450, 452 (8th Cir.1990); *West v. United States*, 729 F.2d 1120, 1122-23 (7th Cir.), *aff'd en banc*, 744 F.2d 1317 (7th Cir.1984), *cert. denied*, 471 U.S. 1053, 105 S.Ct. 2113, 85 L.Ed.2d 478 (1985); *Yolken v. United States*, 590 F.2d 1303, 1303 (4th Cir.1979) (per curiam); *Calhoun v. United States*, 475 F.Supp. 1, 3-4 (S.D.Cal.1977), *aff'd*, 604 F.2d 647 (9th Cir.1979), *cert. denied*, 444 U.S. 1078, 100 S.Ct. 1029, 62 L.Ed.2d 761 (1980).

In *Bowers*, after a medical examination Bowers was to serve five months in the Air Force Reserve and then go on active duty. The Eighth Circuit considered the three rationales supporting *Feres* in the context of the pre-induction medical examination. Bowers was not entitled to any statutory benefits because he had not served any time on active duty. *Id.* at 451. Nevertheless, the court noted that Bower's relationship with the Air Force was distinctively federal, and that a negligence action would have a direct effect on military judgments and decisions. *Bowers*, 904 F.2d at 452. Since two of the three rationales were relevant, the Eighth Circuit applied *Feres* because "there is no question that pre-induction physicals are activities incident to service." *Id.* at 452.

In this case, although Schoemer's enlistment into the Louisiana National Guard adds a state flavor to his relationship with his superiors,[4] he is entitled to veteran's benefits because of his stint on active duty. Furthermore, the availability of a negligence action would require the military to allocate its resources to prevent and compensate mistakes in pre-induction medical examinations. *Bowers*, 904 F.2d at 452. This third rationale is the overriding consideration in any single case. *Scales*, 685 F.2d at 973.

Applying the three *Parker* factors, we conclude that Schoemer's preenlistment medical examination was incident to military service. Furthermore, the policies behind *Feres* support its application to this case. Having considered the totality of the circumstances, we conclude that the district court properly applied *Feres* and dismissed the Schoemers' suit for lack of subject matter jurisdiction.[5]

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[4] State National Guard members serve the state and the nation in a dual capacity. *See Perpich v. Department of Defense*, 496 U.S. 334, 345-46, 110 S.Ct. 2418, 2425-26, 110 L.Ed.2d 312 (1990).

[5] *Feres* bars Shirre Schoemer's derivative claims as well. *See Gaspard v. United States*, 713 F.2d 1097, 1101-02 (5th Cir.1983), *cert. denied*, 466 U.S. 975, 104 S.Ct. 2354, 80 L.Ed.2d 826 (1984). The Schoemers ask us either to overrule *Feres* or to hold its judicially created FTCA exception unconstitutional by separation of powers. We leave these arguments for the Supreme Court.

CONCLUSION

For the foregoing reasons, the district court's dismissal of Appellants' FTCA suit for lack of subject matter jurisdiction is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JENS SCHOEMER, ET AL., Plaintiffs	§	
VS.	§	CIVIL ACTION
UNITED STATES OF AMERICA, Defendant.	§	NO. H-93-4051

ORDER

(Filed Sep. 30, 1994)

This is a medical malpractice and negligence case arising out of a pre-enlistment physical examination Plaintiff Jens Schoemer received at the Houston Military Entrance Processing Station in December 1991. He had enlisted in the United States Army in March 1987 for a period of eight years, four of which were to be on active duty. On August 16, 1991 he had completed the active duty requirement and was assigned to the inactive reserves. Schoemer then decided to complete the remainder of his term of service in the Louisiana National Guard. Since he had been on inactive status and was joining a different branch of service a pre-enlistment physical examination was required.

Schoemer reported to the Military Entrance Processing Station in Houston in December 1991. Plaintiff contends he was diagnosed by Dr. Schnur as having the condition of acromegaly which is an abnormality of the pituitary gland. Dr. Schnur then took Plaintiff to Dr.

Magliolo where the doctors discussed Plaintiff's condition. They ultimately determined that Schoemer was medically qualified for enlistment based upon his previous military service. Treatment for his condition was not recommended.

Plaintiffs filed this suit based upon the Federal Torts Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.* Defendants filed a motion to dismiss on the premise that Plaintiffs' claims were barred by the doctrine in *Feres v. United States,* 340 U.S. 135 (1950). The Court denied Defendant's motion relying primarily on *Jones v. United States,* 729 F.2d 326, 328 (5th Cir. 1984). *Jones* states that in applying *Feres* to suits for medical malpractice the United States Court of Appeals for the Fifth Circuit "has normally looked only to whether the serviceman was a member of the armed forces on 'active duty' at the time of the asserted improper medical treatment." *Jones v. United States,* 729 F.2d at 328. The Fifth Circuit went on to say that in deciding whether *Feres* applies, the Court must consider several factors including the service member's duty status. *Id.* at 329. "While no single factor is necessarily dispositive, . . . the duty status of the service member is usually considered the most indicative of the nature of the nexus between him and the government at the time of injury and is therefore the most important factor." *Adams v. United States,* 728 F.2d 736, 739 (5th Cir. 1984).

Both parties agree that Schoemer had been discharged from active duty prior to the pre-enlistment physical examination performed in conjunction with his enlistment in the Louisiana National Guard. Because *Jones* stated in no uncertain terms that for the *Feres* doctrine to apply the service member had to be on active

status, the motion to dismiss was denied. Additional information was requested regarding Plaintiff's military status.

This Court has been amazed to learn that subsequent Fifth Circuit cases interpreting the *Feres* doctrine have ignored this requirement. *See Kelly v. Panama Canal Commission,* 26 F.3d 597 (5th Cir. 1994); *Fitzpatrick v. United States,* No. 86-1915, unpublished op. at 5 (5th Cir. 1987).

Under the *Feres* doctrine, "the Government is not liable . . . for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Feres v. Unites* [sic] *States,* 340 U.S. 135, 146 (1950). To determine whether the serviceman was acting incident to service the Fifth Circuit applies three factors and considers the totality of the circumstances. *Kelly v. Panama Canal Commission,* 26 F.3d at 600. These factors are: "1) duty status, 2) where the injury occurred, and 3) the activity being performed." *Id. citing Parker v. United States,* 611 F.2d 1007 (5th Cir. 1980). Meeting two of the three factors is sufficient. *See Bowers v. United States,* 904 F.2d 450 (8th Cir. 1990) (claim of negligence on the part of Air Force physician who conducted preinduction physical and failed to discover cancer was barred by the *Feres* doctrine).

The activity of which Plaintiffs complain occurred at a military facility operated by the Department of Defense. The activity performed was to determine whether Schoemer met the physical standards of the military. Plaintiffs' chief argument is that Jens Schoemer was not on active duty at the time of the exam. However, due to his "military status" he enjoyed significantly greater benefits in

the enlistment process and was subjected to less processing requirements than other civilians interested in enlisting in the Louisiana National Guard.

Cross-motions for summary judgment are currently pending. However, "the only correct disposition of a case based on *Feres* is dismissal for lack of subject matter jurisdiction since the United States has not consented to the kinds of suits in which *Feres* applies". *Stanley v. Central Intelligence Agency,* 639 F.2d 1146, 1159 (5th Cir. Unit B 1981), *rev'd on other grounds.* This Court is required to "dismiss a case over which it has no jurisdiction whenever the fatal defect appears." *Id.* As a result, the prior order denying Defendant's motion to dismiss must be vacated. Accordingly, it is

ORDERED that the Court's order of March 18, 1994 denying Defendant's motion to dismiss (entry 4) is set aside. It is further

ORDERED that Defendant's motion to dismiss (entry 4) is GRANTED and this case is DISMISSED with prejudice.

The motions for summary judgment (entries 25 & 26) cannot be ruled on by this Court due to a lack of subject matter jurisdiction and the motion to hold the record open (entry 17) is MOOT.

IT IS SO ORDERED.

Signed this 29th day of September, 1994 at Houston, Texas.

NORMAN W. BLACK
CHIEF JUDGE